MAR 5 2001

No. 00-1251

IN THE

Supreme Court of the United States

PAUL M. PERRONE AND DORIS MCCULLOUGH, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Petitioners,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether detrimental reliance must be proven to recover actual damages for a disclosure violation arising under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, and the Consumer Leasing Act ("CLA"), 15 U.S.C. § 1667 *et seq.*?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, respondent General Motors Acceptance Corporation hereby discloses that it is a wholly-owned subsidiary of General Motors Corporation.

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

While denial of the petition for a writ of certiorari (the "Petition") does not depend upon factual matters, Respondent offers this Counterstatement of the Case to correct misstatements in Petitioners' Statement of the Case.

Petitioners contend that Respondent "fail[ed] to disclose and identify an 'acquisition fee' of $400.00" purportedly charged at the inception of every vehicle lease agreement that was assigned to Respondent prior to the January 1, 1998

effective date of Revised Regulation M.[1] (Pet. at 3.)[2] Respondent asserts that Petitioners' did not pay the lease acquisition fees at lease inception. Instead, Respondent contends, these amounts were included in the capitalized cost of the Petitioners' respective lease transactions and in their monthly payments. (App. A at 2a-3a.) The monthly payments, as well as the totals of monthly payments, were disclosed to Petitioners in their lease agreements. (R. 609-612, 616-20, 629, 656). Thus, Petitioners' claims involve an alleged failure to itemize a component of fully disclosed amounts. Respondent denies this allegation and contends that its disclosures complied with applicable law.[3] (App. A at 3a.)

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[1] Regulation M (12 C.F.R. Part 213) is the Federal Reserve Board regulation implementing the Consumer Leasing Act ("CLA"), 15 U.S.C. § 1667 *et seq*. Regulation M was revised substantially as of January 1, 1998 – after the Plaintiffs allegedly entered into their vehicle lease agreements. Compliance with the revised version of Regulation M became mandatory on January 1, 1998. Consumer Leasing, Delay of Compliance Date, 62 Fed. Reg. 51006 (Sept. 30, 1997) (delaying the mandatory compliance date for Revised Regulation M until January 1, 1998 since it "essentially establishe[d] a new disclosure scheme" that "required the preparation of new forms and the reprogramming of computer software"). Accordingly, unless otherwise noted, all references herein to Regulation M are to the version of Regulation M that was in effect until January 1, 1998.

[2] "Pet. __" denotes citations to the Petition. "App. __" denotes citations to the Petition's Appendix. "R. __" denotes citations to the record before the Fifth Circuit.

[3] Under Regulation M, as it existed at the time, the CLA did not require a lessor to itemize the components of the capitalized cost used to determine the base monthly lease payment. Revised Regulation M, which is *not* applicable to Petitioners' alleged leases, requires disclosure of the "gross capitalized cost" of a motor vehicle lease and a statement of the lessee's option to receive a separate written itemization of the gross capitalized cost prior to the consummation of the lease transaction. *See* Revised Regulation M, 12 C.F.R. § 213.4(f)(1) (2000).

SUMMARY OF ARGUMENT

The decision of the Fifth Circuit, grounded directly in the statutory language and remedial scheme of the CLA, neither conflicts with the decisions of other circuit courts, nor raises an important question of federal law that must be addressed by the Court through this case. Indeed, after the Petition was filed, the Eleventh Circuit issued a unanimous *en banc* decision that overruled the Eleventh Circuit decisions on which Petitioners rely and squarely held that "detrimental reliance is an element of a TILA claim for actual damages." *Turner v. Beneficial Corp.*, __ F.3d __, 2001 WL 172432, at *5 (11th Cir. (Ala.) Feb. 22, 2001). The Petition should be denied.

ARGUMENT

I. THE FIFTH CIRCUIT DECISION IN *PERRONE v. GMAC*

In *Perrone*, the Fifth Circuit unanimously concluded that a plaintiff must demonstrate detrimental reliance to recover actual damages for a CLA disclosure violation. (App. A.) It concluded that the issue was governed by the "plain language" of Section 130(a)(1) of the Truth in Lending Act ("TILA"),[4] 15 U.S.C. § 1640(a)(1), which refers to "any actual damages sustained as a result of the violation":

> According to its plain meaning, the statutory remedy of "actual damages" in section 1640(a)(1) requires a direct causal relationship between the amount of damages and the injury or harm. That the "actual damages"

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[4] The CLA is Chapter 5 of the Truth in Lending Act. A lessor who fails to comply with a CLA disclosure requirement "with respect to any person is liable to such person as provided in Section 130" of TILA. 15 U.S.C. § 1667d(a).

> must be "sustained by such person *as a result of* the failure" links the loss to the failure to disclose. 15 U.S.C. § 1640(a)(1). Actual damage is thus sustained as a result of a failure to disclose under the statute if a consumer can show that, had he been properly informed, he would have engaged in a different or less-expensive transaction.

(App. A at 4a-5a (emphasis added).)

Although its conclusion was dictated by the statutory language, the Fifth Circuit noted that the detrimental reliance requirement becomes further "manifest when § 1640(a) is placed in its statutory context" and contrasted with the statutory damages provision set forth in TILA Section 130(a)(2), 15 U.S.C. § 1640(a)(2). (App. A. at 5a.). The Fifth Circuit explained that the two TILA damages provisions complement one another:

> A comparison of [the statutory and actual damage] provisions supports the conclusion that actual damages are based on detrimental reliance. While the actual damages provision requires a causal connection with the disclosure violation, 15 U.S.C. § 1640(a)(1), the statutory damages provision dispenses with causation and imposes a penalty solely for failure to comply with disclosure requirements. 15 U.S.C. § 1640(a)(2). Without a causation requirement, actual damages would overlay the statutory damages for no apparent reason.

(App. A at 6a.) Rejecting Petitioners' other arguments as contrary to the statutory language and the carefully crafted remedial scheme established by Congress, (App. A at 8a-

15a), the Fifth Circuit affirmed the district court order requiring proof of detrimental reliance to establish actual damages.

II. THE CIRCUIT COURTS UNIFORMLY HAVE HELD THAT PLAINTIFFS MUST PROVE DETRIMENTAL RELIANCE TO RECOVER ACTUAL DAMAGES UNDER TILA SECTION 130(a)(1)

Petitioners contend that a conflict exists between: (1) the Fifth Circuit decision here, and the Eighth Circuit decision in *Peters v. Jim Lupient Oldsmobile Co.*;[5] and (2) prior decisions of the Seventh and Eleventh Circuits. *See* Pet. at 5-8 (citing *Jones v. Bill Heard Chevrolet, Inc.*, 212 F.3d 1356, 1363 n.7 (11th Cir. 2000); *Ransom v. S&S Food Center, Inc. of Florida*, 700 F.2d 670 (11th Cir. 1983); *Gibson v. Bob-Watson Chevrolet GEO, Inc.*, 112 F.3d 283, 285-87 (7th Cir. 1997)). Petitioners are mistaken.

Whatever confusion might once have existed as to the law in the Eleventh Circuit now has been eliminated. In a unanimous *en banc* decision issued after the filing of the Pe-

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[5] 220 F.3d 915 (8th Cir. 2000). In *Peters*, the Eighth Circuit "appl[ied] the traditional definition to the term actual damages as it is used in [TILA] § 1640, and require[d] that a plaintiff prove an injury or loss" that was proximately caused by the TILA violation. *Id.* at 916-17. Under *Peters*, a TILA plaintiff seeking actual damages must demonstrate that he or she: (1) read the disclosure statement; (2) understood the charges being disclosed; (3) would have sought a lower price had the disclosures been made correctly; and (4) would have obtained a lower price. *Id.* at 917; *see Bizier v. Globe Financial Services, Inc.*, 654 F.2d 1, 4 (1st Cir. 1981) (award of TILA actual damages requires proof of damages and causation, in addition to threshold showing of a TILA violation) (dicta); *see also Stout v. J.D. Byrider*, 228 F.3d 709, 718 (6th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3552 (U.S. Feb. 20, 2001) ("[A]ny resolution of . . . the TILA claims requires an individual assessment of what documents the customer reviewed and in what manner, what representations Defendants made to each customer, and whether the customer selected the extended service agreement").

tition, the Eleventh Circuit expressly overruled both *Jones* and *Ransom*, and squarely held that "detrimental reliance is an element of a TILA claim for actual damages." *Turner v. Beneficial Corp.*, 2001 WL 172432, at *5.

The Eleventh Circuit based its decision on the same statutory language that the Fifth Circuit found compelling, concluding that "this language indicates that the statute's authors intended that plaintiffs must demonstrate detrimental reliance in order to be entitled to actual damages under TILA". *Id.* The *en banc* court also noted that: (1) the *Jones* Court had relied on a prior Fifth Circuit precedent, which "does not state whether the plaintiff sought actual or statutory damages"; and (2) "the Ransom Court did not squarely address the [detrimental reliance] issue, and it is not clear from the opinion that the issue was actually raised". *Id.* at *4-5 & n.6 (citations omitted).

In *Gibson v. Bob Watson Chevrolet-Geo, Inc.*, the Seventh Circuit addressed whether a TILA claim could proceed under the allegation that an automobile dealer had stated that the entire price of a service contract was being paid to a third party, when the dealer actually was retaining a portion of the charge. *Gibson,* 112 F.3d at 284. Although *Gibson* held that an allegation to this effect stated a TILA disclosure claim, it did not "speak[] directly to the issue of actual damages".[6] (App. A at 9a.) Consistent with this understanding of *Gibson*, numerous post-*Gibson* decisions by district courts within the Seventh Circuit have required detrimental reliance for proof of actual damages.[7]

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[6] *Cf. Peters*, 220 F.3d at 916-17 (addressing detrimental reliance question in case involving the same type of TILA disclosure violation after plaintiff had conceded "that the only remedy for failing to make this type of disclosure . . . is actual damages").

[7] *See Hoffman v. Grossinger Motor Corp.*, No 96-C-5362, 1999 WL 184179, at *4 (N.D. Ill. March 29, 1999); *Anderson v. Rizza Chevrolet,*

(footnote continued. . .)

In sum, no split exists among the circuits requiring resolution by this Court. The only precedents to the contrary are a handful of lower court decisions (*see* Pet. at 6), which, for the most part, follow a bankruptcy court decision that one commentator appropriately characterized as "a radical departure from established Truth in Lending case law". D. Edwin Schmelzer, *Truth in Lending Development in 1987: An Active Year on Several Fronts*, 43 Bus. Law. 1041, 1067-68 (May 1988) (discussing *In re Russell*, 72 B.R. 855 (Bankr. E.D. Pa. 1987)). As the Fifth Circuit noted in its decision, the *Russell* bankruptcy court based its decision on a "substantial violation" versus a "mere technical violation" standard for which there is no support in the language of TILA Section 130(a)(1). (App. A at 10a.)

III. THE DECISION BELOW PRESENTS NO QUESTION OF EXCEPTIONAL IMPORTANCE TO THIS COURT

Apparently dissatisfied with the maximum amount of statutory damages recoverable in a TILA or CLA class action, Petitioners contend that "class actions for actual damages are the only effective means of achieving widespread

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Inc., 9 F. Supp. 2d 908, 913 (N.D. Ill. 1998); *Johnson v. Aronson Furniture Co.*, No. 96-C-117, 1998 WL 641342, at *7 (N.D. Ill. Sept. 11, 1998) (following *Gibson* with respect to the issue of whether service contract disclosure violated TILA, but requiring detrimental reliance to recover actual damages); *Balderos v. Illinois Vehicle Premium Fin. Co.*, No. 96-C-8050, 1997 WL 627650, at *6 (N.D. Ill. Oct. 2, 1997); *Groth v. Rohr-Ville Motors, Inc.*, No. 95-C-05429, 1997 WL 630189, at *3-5 (N.D. Ill. Sept. 30, 1997) (following *Gibson* with respect to question of whether service contract disclosure violated TILA, but noting that "establishing that [a] Saturn [dealership] violated TILA does not end the inquiry. The court must next determine what damages (if any) [plaintiff] may recover for Saturn's TILA violation"); *Laughman v. Wells Fargo Leasing Corp.*, No. 96-C-925, 1997 WL 567800, at *2 (N.D. Ill. Sept. 2, 1997); *Lindsey v. Johnson Oldsmobile, Inc.*, No. 95-C-7306, 1997 WL 269627, at *4 (N.D. Ill. May 14, 1997).

compliance [with TILA]." (Pet. at 10.) However, Petitioner's view of proper "[p]olicy considerations cannot override [the] interpretation of the text and structure of [an] Act." *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 168 (1994).

In *Central Bank*, the Court held that no civil liability exists for "aiding and abetting" under Section 10(b) of the Securities Exchange Act of 1934, because the "words 'aid' and 'abet' were not part of the statutory text." 511 U.S. at 176-77. In response to the policy argument that civil aiding and abetting liability would advance the purposes of the Securities Exchange Act, the Court stressed that the "issue . . . is not whether imposing private civil liability on aiders and abettors is good policy but whether aiding and abetting is covered by the statute." *Id.* at 177.

Here too, Petitioners' personal opinions as to the assertedly inadequate deterrent effect of the TILA statutory damages remedy cannot override the balance struck by Congress between the need to deter potential violations and the desire to avoid subjecting creditors to ruinous liability without proof of "actual damages" sustained "as a result of" a disclosure violation. *Turner*, 2001 WL 172432, at *2 ("Congress placed [a] ceiling on a defendant's statutory [damages] liability in a class action so that courts would no longer have to 'choose between denying class actions altogether or permitting multi-million dollar recoveries against defendants for minor or technical violations'") (citation omitted).

IV. PETITIONERS' REMAINING CONTENTIONS ALSO LACK MERIT

Petitioners' remaining contentions (App. 10-29) were all raised, in one form or another, before the district court and the Fifth Circuit, and were properly rejected by each of them.

In arguing that a detrimental reliance requirement for actual damages conflicts with the claimed nature of TILA as

a "strict liability, remedial statute" (Pet. at 11-12), Petitioners seek to re-write the statute. They also ignore the Fifth Circuit's observation that "statutory damages may be imposed as a means to encourage private attorneys general to police disclosure compliance even where no actual damages exist." (App. A at 6a.) As the Fifth Circuit noted, TILA Section 130(a)'s provision for the recovery of both statutory damages *and* actual damages "comports with the notion that actual damage awards [complement the statutory damage remedy in that they] must be assessed as an individualized harm." (App. A at 7a.)

Petitioners equally disregard the statutory scheme in contending that detrimental reliance should not be required here because it purportedly is not required with respect to two provisions that are not at issue in this case – the administrative agencies' power under TILA Section 108(e), and the creditors' "correction of errors" defense under TILA Section 130(b). The Fifth Circuit rejected this argument, noting:

> Administrative, self-policing, and civil remedies serve different functions. . . . While the remedies may share the common goal of increased disclosure, there is no reason to suppose that they must share the same mechanism of enforcement.

(App. A at 12a (footnotes omitted).)

Equally misplaced are Petitioners' varied attempts to apply theories from entirely different statutory and common law regimes. *First*, Petitioners assert that the Fifth Circuit wrongly rejected their proffered analogy to this Court's securities fraud decision in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), which they assert "provides for a presumption of reliance where there is a duty to disclose and there has been a material omission." (Pet. at 18.) However, the *Affiliated Ute* exception to the general requirement

of detrimental reliance in Rule 10b-5 cases is attributable to the fact that securities investment decisions often are made in reliance on the integrity of a securities market that does not involve face-to-face transactions:

> The modern securities markets, literally involving millions of shares changing hands daily, differ from the face-to-face transactions contemplated by early fraud cases, and our understanding of Rule 10b-5's reliance requirement must encompass these differences.
>
> . . .
>
> An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.

Basic Inc. v. Levinson, 485 U.S. 224, 243-44, 247 (1988) (citations omitted). Accordingly, this limited presumption of reliance cannot properly be applied outside the Rule 10b-5 context. *See McCoy v. Salem Mortgage Co.*, 74 F.R.D. 8, 12 (E.D. Mich. 1976) (rejecting application of *Affiliated Ute* to TILA claim). *See also Mergens v. Dreyfoos*, 166 F.3d 1114, 1119 (11th Cir.), *cert. denied*, 528 U.S. 820 (1999) (rejecting attempt to apply *Affiliated Ute* to common law fraud); *Elliott v. ITT Corp.*, 150 F.R.D. 569, 582 (N.D. Ill.) (magistrate report and recommendation) ("Because the consumer market is a non-perfect market, the presumption of reliance in fraud on the market . . . cases [cannot] be extended to consumer fraud cases."), *report and recommendation adopted*, 150 B.R. 36 (N.D. Ill. 1992).

Second, Petitioners misstate the causation requirement for a damages claim under the antitrust laws. Not only must an antitrust plaintiff prove that the antitrust violation caused it injury, *see Zenith v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969), it faces the additional hurdle of proving "antitrust injury" (*i.e.*, injury of the type the antitrust laws were intended to prevent). *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977) (affirming dismissal of antitrust claims for lack of "antitrust injury" even though causal injury shown).

Finally, the Fifth Circuit properly denied Petitioners' attempt to apply contract law principles to the "elaborate system of [TILA] remedies and penalties" (*Sosa v. Fite*, 498 F.2d 114, 117 (5th Cir. 1974)) enacted by Congress. As the Fifth Circuit stated:

> [W]e disagree with the attempt to transform this statute-based claim into one founded on contract. Congress gave no indication that courts should base damage awards on anything other than the explicit words of the statute . . . The statute is not a remedy for breach of contract. "The damage provisions, providing minimum and maximum limits, [are] inconsistent with such a thesis . . .." *Sellers v. Wollman*, 510 F.2d 119, 122 (5th Cir. 1975).

(App. A at 11a.)

CONCLUSION

Petitioners' request for a writ of certiorari to the Fifth Circuit should be denied.

Respectfully submitted,

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